Denovo Legal LLC d/b/a Epiq Document Review Solutions *and* Timothy Tanner. Case 02–CA–182019

October 26, 2018

DECISION AND ORDER REMANDING[1]

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

Pursuant to a charge and an amended charge filed by Timothy Tanner, an individual, the General Counsel issued a complaint on November 30, 2016. The complaint alleges, in part, that the Respondent has maintained unlawful workplace policies in its Employment, Confidential Information and Arbitration Agreement and Release (Employment Agreement) in violation of Section 8(a)(1) of the Act. The complaint also alleges that the Respondent violated Section 8(a)(1) by discharging Tanner for refusing to sign the Employment Agreement. On January 17, 2017, the General Counsel filed a Motion for Summary Judgment, arguing, among other things, that the arbitration provision in the Employment Agreement violates the Act pursuant to the Board's decisions *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc*., 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015).

On February 13, 2017, the National Labor Relations Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed an answer to the Notice to Show Cause and cross-motion for Summary Judgment.

1. Recently, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ____, 138 S. Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. Id. at ___, 138 S.Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. Id. at ___, 138 S.Ct. at 1619, 1632. In light of the Supreme Court's decision in *Epic Systems*, which overrules the Board's holding in *Murphy Oil USA, Inc.*, we conclude that the complaint allegation that the arbitration provision in the Employment Agreement is unlawful based on *Murphy Oil* must be dismissed.

2. In the pending motions, the parties take conflicting positions regarding the lawfulness of other of the Respondent's challenged rules under the "reasonably construe" prong of the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). On December 14, 2017, the Board issued its decision in *Boeing Co.*, 365 NLRB No. 154, slip op. at 14–17 (2017), in which it overruled the *Lutheran Heritage* "reasonably construe" test and announced a new standard that applies retroactively to all pending cases. Under the standard announced in *Boeing*, the parties' motions do not establish that there are no genuine issues of material fact and that either party is entitled to judgment as a matter of law as to these complaint allegations.

Accordingly, we deny without prejudice the Motions for Summary Judgment with respect to these complaint allegations, and we will remand this proceeding to the Regional Director for Region 2 for further action as she deems appropriate.

ORDER

The complaint allegation that the maintenance of the arbitration provision in the Employment Agreement unlawfully restricts employees' statutory rights to pursue class or collective actions is dismissed.

IT IS FURTHER ORDERED that the parties' Motions for Summary Judgment are denied without prejudice in all other respects, and these proceedings are remanded to the Regional Director for Region 2 for further appropriate action.

Dated, Washington, D.C. October 26, 2018

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.